STEVEN P. REMME

IBLA 76-152 Decided February 11, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, holding a homesite notice of location (AA-8367) unacceptable for recordation.

Set aside and remanded.

1. Alaska: Homesites -- Alaska: Possessory Rights -- Withdrawals and Reservations: Generally

   The filing of a notice of location for a homesite will not prevent a withdrawal from attaching to the land if, prior to the effective date of the withdrawal, the locator of the homesite fails to perform the requisite acts of use, occupancy and development necessary to establish a valid existing right excepted from a withdrawal.

2. Administrative Procedure: Hearings -- Alaska: Homesites -- Alaska: Possessory Rights -- Withdrawals and Reservations: Generally

   Where the claimant of a homesite filed his notice of location prior to the segregation of the land by a withdrawal made subject to valid existing rights, and alleges that he initiated the development of improvements sufficient to establish a valid existing right prior to the withdrawal, it is error for the Bureau of Land Management to hold that the location notice was unacceptable for recordation, and the claim may only be canceled following notice to the claimant and an opportunity to demonstrate

the establishment of a valid existing homesite claim prior to the withdrawal.

APPEARANCES: Steven P. Remme, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Steven P. Remme has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 9, 1975, holding his notice of location for a 5-acre homesite unacceptable for recordation.

Appellant originally filed his location notice on May 25, 1973, claiming occupancy of lands for use as a homesite pursuant to the Act of May 26, 1934, 84 Stat. 809, 43 U.S.C. § 687a (1970); see also 43 CFR Subpart 2563. His location notice described by metes and bounds a 5-acre tract within section 19 of unsurveyed T. 9 N., R. 3 E., Seward Meridian, Alaska. As of the date of filing he claimed no improvements on the land.

On March 28, 1974, Public Land Order (PLO) 5418, 39 FR 11547 (1974), withdrew all unreserved public lands in Alaska from location and settlement under the public lands laws, subject to valid existing rights. On June 6, 1974, the BLM conducted a field examination of the claim by flying over the area in a helicopter at tree-top level. The field examiner determined that there was no evidence of clearing or improvements on the claim at that time. On July 28, 1974, low-level aerial photography was made of the area and upon examination of the prints in stereoscope there was no indication of clearing or improvements on appellant's claim.

On September 17, 1974, and again on February 10, 1975, the BLM conducted on-site field examinations of the claim. A clearing, pilings, and a tool cache were found on the September 17 visit. No changes or additional evidence of use, occupancy or development had occurred by the time of the subsequent examination of February 10. The field report, approved March 24, 1975, concludes as follows:

> I conclude that there has been insufficient appropriation of these lands to segregate them because of the lack of continuing acts of construction or other improvements. It appears that the applicant has not acted in good faith in attempting to comply with the regulations as contained in 43 CFR 2563. I must also conclude that he did not establish a valid right prior to PLO 5418.
>
> I, therefore, recommend that the applicant's notice of location be declared unacceptable for recordation and this casefile be closed.

In its decision, the State Office informed appellant that the mere filing of a notice of location would not by itself create any rights in the land and that occupation, actual possession and placing of improvements upon the land were a prerequisite to the assertion of a valid right. It then concluded that the field examinations confirmed the fact that there were no improvements on the land nor were there any signs of use of the site by appellant to show that he had appropriated the land. The State Office then determined that, based upon the field examinations, appellant had failed to establish the validity of his claim prior to the effective date of PLO 5418. Accordingly, the State Office declared his notice of location unacceptable for recordation.

In his statement of reasons on appeal appellant first points out that when he originally filed his notice of location he may not have fully understood what would be considered "improvements" when he indicated that none existed on the land. He states:

When I first started going to the land, I put up a small shelter, covered it with plastic, and used it for shelter from wind and rain, for sleeping, and also for my food cache. At this time I was clearing a place for my habitable house, cutting my pilings, and digging holes to set them in. I took this shelter down in the spring of 1974.

Appellant also urges that it was a "mistake" for the State Office to conclude that there were no improvements on the land when the field examinations were conducted in September of 1974 and February of 1975. Appellant maintains that the clearing and cut pilings were visible during the examinations and were improvements initiated prior to the withdrawal. Appellant argues that he continued his development of the claim in May of 1975 when he started carrying in materials for construction of the home, and he has submitted photographs depicting a houseframe on the site which was constructed prior to his being served with a copy of the BLM's decision. Appellant emphasizes that he has spent considerable time and money and has exercised good faith in attempting to develop the homesite.

To begin with, we point out that since the effective date of PLO 5418 was subsequent to the filing date of appellant's notice of location, the notice could be denied recordation if it were defective on its face, Edward P. Dooley, 22 IBLA 338 (1975), but the withdrawal itself cannot be used as a basis for declaring the notice to be unacceptable for recordation. In fact, the master title plat for the township, as of May 16, 1973, depicts appellant's homesite location, and, thus, the purposes of recordation were served. Stephen P. Sorensen, 22 IBLA 258, 260 (1975); Donald J. Thomas, 22 IBLA 210, 211 (1975); Allen D. Hodge, 22 IBLA 150, 152 (1975). Assuming the land was otherwise open to location

on the filing date, the presence of a valid existing homesite claim as of the effective date of the withdrawal is the proper determination to be made, and, despite the prima facie invalidity of appellant's notice, this was, in effect, the inquiry conducted by the State Office in this instance.

[1] As the State Office pointed out, the mere filing of a notice of location, while essential to permit one who files to receive credit for use and occupancy of his claim, 43 U.S.C. § 687a-1 (1970), does not of itself create any rights in the land, "the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land" and their relationship to the requirements of law under which the applicant seeks to initiate a claim to the land. Margaret L. Klatt, 23 IBLA 59, 62 (1975). Thus, the filing of a notice of location for a homesite will not prevent a withdrawal from attaching to the land if, prior to the effective date of the withdrawal, the locator of the homesite fails to perform the requisite acts of use, occupancy and development necessary to establish a valid existing right in the claim. Richard T. Pope, 22 IBLA 374 (1975); Edward P. Dooley, supra; Stephen P. Sorensen, supra. In the present case the BLM field examiners concluded that appellant had failed to establish a valid right to his claim prior to the effective date of the withdrawal "because of the lack of continuing acts of construction or other improvements" and the failure to act "in good faith" in attempting to comply with the Homesite Act. In his appeal to the Board, appellant generally contradicts the position taken in the field report. Accordingly, appellant's possible noncompliance with the requirements of the Homesite Act has not been established by admitted or undisputed facts.

[2] Where the facts contained in a BLM field report are denied or contradicted by the claimant, a decision canceling the claim should not be issued solely on the basis of such a report. Instead, the claimant should be given an opportunity to present evidence to substantiate his position that he has complied with the law. Richard T. Pope, supra at 375; Donald J. Thomas, supra at 212. In the present case appellant has submitted information on appeal in an attempt to refute the position taken in the field report, and he has made a showing of initial development efforts to comply with the homesite law prior to the withdrawal. Upon return of this case, the State Office shall consider the allegations made by the appellant relating to his use, occupancy and development, and shall, if it deems them not to be factually correct, institute a contest against the claim. However, the State Office shall first record the notice of location, its prima facie invalidity having been overcome by appellant's allegations on appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case remanded for further proceedings consistent with this opinion.

Martin Ritvo
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge